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No. 00-75

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IN THE
SUPREME COURT OF THE UNITED STATES

MICHAEL WADE, *et al.*,
Petitioners,
v.
DIANE COUGHLIN, *et al.*,
Respondents.

On Petition For Writ Of Certiorari To
The United States Court Of Appeals For The Fourth Circuit

REPLY TO BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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Petitioners ask this Court to determine whether the Fourth Circuit errs in refusing to permit plaintiffs to rely on the catalyst theory to demonstrate that they are prevailing parties under 42 U.S.C. § 1988 and other federal fee shifting statutes. Even though this Court last term suggested that the Fourth Circuit's reasoning in abolishing the catalyst theory was seriously flawed, the court below has been unwilling to overrule itself, or even reconsider the issue. That unwillingness

is particularly problematic, given that eleven other circuits permit plaintiffs to rely on the catalyst theory. This Court should grant the petition to correct the error of the court below.

Even before this Court issued *Friends of the Earth, Inc. v. Laidlaw Environmental Services (TOC), Inc.*, 120 S. Ct. 693 (2000), which repudiated the Fourth Circuit's interpretation of *Farrar v. Hobby*, 506 U.S. 193 (1994), the district court in this case foresaw that this Court might need to review the question presented:

> Every other Circuit that has considered the catalyst theory after *Farrar* appears to have recognized its continued validity. Strong public policy arguments may be articulated in support of this result; perhaps even stronger arguments may be made that the opinion in *Farrar* should not be read to overturn a previously well-established basis for recovery of attorney's fees. In the absence of any Supreme Court decision to the contrary, however, this court is of course obligated to follow Fourth Circuit law.

Pet. App. 14a (footnotes and citation omitted).

The State makes two arguments in opposition to the petition. First, the State asserts that the Fourth Circuit's decision to abolish the catalyst theory was correct and consistent with decisions of this Court. Second, it claims that some of the other courts of appeals do not disagree with the Fourth Circuit (even though many of them explicitly say that they do). Throughout its opposition, the State also intimates that the facts of this case make it an improper one to review whether the catalyst theory remains viable.

The State's first argument has already been discredited by this Court in *Friends of the Earth,* 120 S. Ct. at 711. The State's second argument is based on an erroneous legal assumption as well as a misreading of the law in some circuits. The State's intimations that this is not the proper case to review the continued vitality of the catalyst theory are not only wrong but also irrelevant to the question presented, because the district court reserved decision on all relevant factual issues in the event that the catalyst theory becomes available. Petitioners file this Reply to fully explain the fallacies in the State's opposition to the *certiorari* petition.

I. The State And The Court Below Continue To Rely On A Discredited Interpretation Of An Opinion By This Court

The State continues to assert that the Fourth Circuit was correct in *S-1 and S-2 By and Through P-1 and P-2 v. State Bd. of Educ.,* 21 F.3d 49 (4th Cir.) (*en banc*), *cert. denied*, 513 U.S. 876 (1994), when it abolished the catalyst theory and held that formal judgment, consent decree or settlement agreement are the only means by which a plaintiff can demonstrate prevailing party status. Other developments besides these can moot the need for continued litigation and, if caused by the lawsuit, serve as the basis for a determination that plaintiffs are prevailing parties. Like the court below in *S-1*, the State relies primarily on *Farrar*, 506 U.S. 103, to support its assertion, but this Court said in *Friends of the Earth*, 120 S. Ct. at 711, that *Farrar* did not extinguish the catalyst theory. For factual reasons that do not exist in this case, this Court in *Friends of the Earth* found it "premature" to rule on the continued vitality

of the catalyst theory.[1] By granting the petition, this Court can put the issue to rest.

The State reads the statement of this Court in *Texas State Teachers Ass'n. v. Garland Indep. School Dist.*, 489 U.S. 782, 793 (1989), that "[t]he touchstone of the prevailing party inquiry must be the material alteration of the legal relationship of the parties in a manner which Congress sought to promote in the fee statute," to mean that only a formal judgment, consent decree or settlement can materially alter the parties' legal relationship and thus confer prevailing party status. But nothing in that statement, or anything else in that opinion, indicates that this Court sought to restrict prevailing plaintiffs from relying on other post-filing developments to demonstrate eligibility for attorney's fees. Like the Fourth Circuit's construction of *Farrar*, the State's construction of *Texas State Teachers Ass'n.* is novel but unwarranted.

II. The Rule In Eleven Other Circuits Irreconcilably Conflicts With The Rule In The Fourth Circuit

The State fails to mount a serious argument that eleven other circuits do not restrict plaintiffs to formal judgments, consent decrees and settlement agreements in proving prevailing party status. Indeed, the State does not even try to take issue with the fact that *S-1* conflicts with the rule in the

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[1] In *Friends of the Earth*, the district court stayed the time for filing attorney's fees petitions until after the appeal on the merits had been resolved. When the Fourth Circuit held that plaintiffs could not recover attorney's fees, no order permitting or denying attorney's fees was before it. *See* 120 S. Ct. at 711-12.

Third, Sixth, Eighth and D.C. Circuits. But the State does try to reconcile *S-1* with the decisions of some other circuits.

Relying on its misreading of *Texas State Teachers Ass'n*, the State tries to suggest that opinions from some circuits are only "semantically" in conflict with *S-1*. *See* Brief in Opposition at 8. The conflict between the Fourth Circuit and eleven other circuits is not a semantic one. The State cannot escape the fact that in the other circuits plaintiffs may point to more than a formal judgment, consent decree or settlement agreement to establish prevailing party status. *See, e.g., Paris v. U.S. Department of Housing and Urban Development*, 988 F.2d 236 (1st Cir. 1993) (supervening legislation); *Zinn v. Shalala*, 35 F.3d 273 (7th Cir. 1994) (supervening regulation); *Morris v. West Palm Beach*, 194 F.3d 1203, 1208 (11th Cir. 1999) (amendments to ordinance and policy). And the district court has already said that plaintiffs here might well be prevailing parties, if the catalyst theory is available to them. *See* Pet. App. 12a. In any other circuit but the one that has jurisdiction over this lawsuit, plaintiffs would at least be entitled to a factual determination of whether they are prevailing parties.

The State also suggests that the Second and Seventh Circuits may be moving toward the Fourth Circuit's "no catalyst" rule. This is flatly incorrect. In *Morris v. Lindau*, 196 F.3d 102, 116 (2d Cir. 1999), the court recently reiterated that "[u]nder the 'catalyst doctrine,' a plaintiff who obtains a settlement *or a voluntary cessation of the challenged activity* is a 'prevailing party' entitled to attorney's fees under 42 U.S.C. § 1988, if the lawsuit was a catalyst or a substantial factor for the defendant's favorable action." (emphasis added). Likewise, in *Krocka v. Chicago*, 203 F.3d 507, 517 (7th Cir. 2000), the court reiterated that "where the defendant voluntarily

granted the plaintiffs' desired relief and the pending case was dismissed as moot, the plaintiffs may [be] entitled to attorney's fees . . . ." (quoting *Zinn*, 35 F.3d at 276). And although the plaintiffs in the Ninth and Tenth Circuit decisions cited in the Petition could point to a formal judgment or settlement agreement, that observation does not take away from the fact that these circuits continue to permit plaintiffs to establish that they are prevailing parties via the catalyst theory. *See, e.g.*, *Kasza v. Browner*, 133 F.3d 1159, 1175 (9th Cir.) (Agreeing with district court determination that plaintiff was prevailing party because government mooted lawsuit by performing activities that plaintiff demanded in her complaint), *cert. denied*, 525 U.S. 967 (1998).

III. The State's Fact-Based Arguments Are Incorrect And Irrelevant To The Question Presented

The State incorrectly argues that petitioners cannot demonstrate that they are prevailing parties under the "material alteration" gloss that this Court gave to that term in *Texas State Teachers Ass'n*. The State is required to make findings pursuant to State law before any individual may be admitted to a residential facility like Great Oaks, released or transferred to a community-based care facility. The State issued "final decisions" that the Great Oaks residents were no longer suitable for residential treatment and that they were being transferred to community facilities. *See* J.A. 129 (Defendants' Memorandum in Support of Motion to Dismiss or Stay at 8).[2] Notices of the State's *en masse* reversal were issued in November 1995 and January 1996, more than four years after this litigation

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[2] "J.A." refers to the Joint Appendix that was filed in the court of appeals.

commenced and very shortly after the district court had set this case for trial in October 1995. *See* J.A. 502-03.[3] The district court noted in its opinion that while this could not satisfy the test established in *S-1*, it "might be relevant for consideration under a catalyst theory." Pet. App. 14a-15a n. 6. The district court should be permitted to consider this and other arguments in deciding whether plaintiffs are prevailing parties.

The State is also incorrect in contending that petitioners will not be able to demonstrate that they are prevailing parties if they are permitted to rely on the catalyst theory, and that some of the attorney's fees and costs generated by plaintiffs were unnecessary. The district court cited various admissions by State officials that this lawsuit *was* a factor in the decision to close the Center. *See* Pet. App. 13a n. 3. And it is hardly surprising that the parties continued to engage in discovery after Governor Glendening announced his intention to close Great Oaks in July 1995, because in October 1995 the district court set a trial date for the following June. In any event, the district court explicitly said that it was not resolving any factual issues related to plaintiffs' prevailing party status, and it specifically allowed the State to reserve its right to rebut plaintiffs' claims, if the Fourth Circuit or this Court holds that the catalyst theory is available. App. 12a-13a n. 3.

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[3] As the State acknowledges in its Brief in Opposition at page 7, it would have to render new "final decisions," and it would also have to satisfy the standards set forth by this Court in *Olmstead v. L.C. ex rel. Zimring*, 119 S. Ct. 2176, 2181 (1999), before it could reinstitutionalize the former residents of Great Oaks. The State is thus *not* free to return to the policies that led to this lawsuit.

CONCLUSION

For the foregoing reasons, petitioners respectfully request that their petition for writ of certiorari be granted.

Respectfully submitted,

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